

**QUINN EMANUEL URQUHART & SULLIVAN, LLP**

Stephen A. Broome (CA Bar No. 314605)  
stephenbroome@quinnemanuel.com  
Viola Trebicka (CA Bar No. 269526)  
violatrebicka@quinnemanuel.com  
Crystal Nix-Hines (Bar No. 326971)  
crystalnixhines@quinnemanuel.com  
Rachael L. McCracken (CA Bar No. 252660)  
rachaelmccracken@quinnemanuel.com  
Alyssa G. Olson (CA Bar No. 305705)  
alyolson@quinnemanuel.com  
865 S. Figueroa Street, 10th Floor  
Los Angeles, CA 90017  
Telephone: (213) 443-3000  
Facsimile: (213) 443-3100

Andrew H. Schapiro (admitted *pro hac vice*)  
andrewschapiro@quinnemanuel.com  
Teuta Fani (admitted *pro hac vice*)  
teutafani@quinnemanuel.com  
Joseph H. Margolies (admitted *pro hac vice*)  
josephmargolies@quinnemanuel.com  
191 N. Wacker Drive, Suite 2700  
Chicago, IL 60606  
Telephone: (312) 705-7400  
Facsimile: (312) 705-7401

Jomaire Crawford (admitted *pro hac vice*)  
jomairecrawford@quinnemanuel.com  
D. Seth Fortenbery (admitted *pro hac vice*)  
sethfortenbery@quinnemanuel.com  
51 Madison Avenue, 22nd Floor  
New York, NY 10010  
Telephone: (212) 849-7000  
Facsimile: (212) 849-7100

Xi ("Tracy") Gao (CA Bar No. 326266)  
tracygao@quinnemanuel.com  
Carl Spilly (admitted *pro hac vice*)  
carlspilly@quinnemanuel.com  
1300 I Street NW, Suite 900  
Washington D.C., 20005  
Telephone: (202) 538-8000  
Facsimile: (202) 538-8100

*Counsel for Defendant Google LLC, additional counsel listed in signature block below*

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**

CHASOM BROWN, *et al.*, on behalf of  
themselves and all others similarly situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No. 4:20-cv-03664-YGR-SVK

**GOOGLE LLC'S OPPOSITION TO  
PLAINTIFFS' MOTION *IN LIMINE* 5  
RE: DISPARAGING EVIDENCE OR  
ARGUMENT**

The Honorable Yvonne Gonzalez Rogers  
Date: November 29, 2023  
Time: 9:00 a.m.  
Location: Courtroom 1 – 4<sup>th</sup> Floor

Trial Date: January 29, 2024

1 **I. INTRODUCTION**

2 Plaintiffs seek an exclusion order on two unrelated issues, neither of which has merit.

3 *First*, Plaintiffs seek to bar Google from referencing two named Plaintiffs' professions. But  
4 that testimony, enmeshed with crucial issues of expectations of privacy and consent, cannot be  
5 excluded. Mr. Byatt works in politics and "mostly" uses Incognito for "news," a likely job function  
6 that diminishes his privacy expectation. And Mr. Brown has experience monetizing user data in the  
7 course of running his retail cannabis business—from which a jury could conclude that he was aware  
8 how Google collects user data, and consented to it. Google has no intention of "disparaging"  
9 Plaintiffs' professions but they may very well come up and be relevant to issues at trial.

10 *Second*, Plaintiffs seek an order to exclude the term "porn mode" to refer to Incognito.  
11 Google has no intention of characterizing Incognito as "porn mode." Google opposes this portion  
12 only because Plaintiffs have not identified the specific documents or evidence they seek to  
13 exclude—as required by the Court's Standing Order—and may seek to redact certain documents in  
14 a way that would make it look like Google is concealing something at trial.

15 Granting this Motion would prejudice Google, not Plaintiffs. The Court should deny it.

16 **II. ARGUMENT**

17 **A. Byatt's and Brown's Backgrounds Are Relevant**

18 Google does not intend to "disparage" either Plaintiff's profession. But their employment  
19 may be relevant at trial and there is no basis for precluding Google from asking them about their  
20 professional lives or their use of Incognito for work.

21 **Mr. Byatt's Background Is Relevant.** A critical issue in this case is whether Plaintiffs had a  
22 reasonable expectation of privacy when using Incognito. Mr. Byatt is former Treasurer and current  
23 State Committeeman for the Miami-Dade Democratic Party. Trebicka Decl., Ex. A (Byatt Dep.) at  
24 189:20-192:8. He uses Incognito "mostly" for "reading news," *id.* at 92:22-93:14, which is  
25 presumably a job function for someone working in local politics. Any use of Incognito by Mr. Byatt  
26 for work diminishes any privacy interest. *See, e.g., United States v. Barrows*, 481 F.3d 1246, 1248  
27 (10th Cir. 2007) (city treasurer lacked privacy expectation in personal computer containing  
28

1 pornography because “the significance of personal ownership is particularly weakened when the  
2 item in question is being used for business purposes”).

3 Nor is there prejudice. Plaintiffs assert that Mr. Byatt’s “political activities” will “arouse  
4 prejudice,” Mot. 3, but there is no basis to believe that. *See Democracy Partners, LLC v. Project*  
5 *Veritas Action Fund*, 2021 WL 4785853, at \*5 (D.D.C. Oct. 14, 2021) (“It is not the case that any  
6 evidence suggesting a connection between defendants and the former president inherently leads to  
7 ‘unfair prejudice’”). Mr. Byatt’s background is clearly relevant, not prejudicial, and should not be  
8 excluded.

9 **Mr. Brown’s Background Is Relevant.** One of Google’s defenses is that its receipt of PBM  
10 data is routine, accepted, and consented to by users and the websites using Google’s services. Mr.  
11 Brown owns a “retail cannabis company.” Trebicka Decl., Ex. B (Brown Dep.) at 17:19-18:11,  
12 77:16-78:11, 79:14-15. He testified that as part of that business, he has “monetized user data.” *Id.*  
13 at 76:9-10, 77:6-18. His experience running this business, paired with his experience “us[ing]  
14 Google AdSense” for one of his other businesses, *id.* at 74:4-75:15, helped him understand how  
15 “data can be monetized.” *Id.* at 73:18-74:9. In view of Mr. Brown’s sophisticated business  
16 background, a jury could find he would have been aware of the kinds of data Google collects when  
17 in Incognito, and that he consented to it. *See, e.g., Lopez-Venegas v. Beers*, 2013 WL 12474081, at  
18 \*13 (C.D. Cal. Dec. 27, 2013) (“consent” depends on “the characteristics of the individual, including  
19 the person’s ... business experience”).

20 Plaintiffs again offer only conclusory assertions of prejudice. Mot. 3. Plaintiffs point out that  
21 Mr. Brown’s “marijuana-related work” is “legal” (Mot. 1), so there is no credible argument that  
22 Plaintiffs would be prejudiced if the jury learns he works in the cannabis industry. *See, e.g., Olsen*  
23 *v. Pac. Indem. Co.*, 2019 WL 1877357, at \*6 (D. Ariz. Apr. 26, 2019) (“Plaintiff’s argument that  
24 questions about his association with the operation of state regulated dispensaries of a substance  
25 which ... is and has been legal for nearly ten years under state law does not constitute prejudice”).  
26 That the evidence portrays Mr. Brown as a savvy businessman and not a substance user, combined  
27  
28

1 with the limited role it would play at trial, further diminishes any prejudice. Mr. Brown's  
2 background is relevant, not prejudicial, and should not be excluded.

### 3 **B. Precluding Any Reference to “Porn Mode” Would Prejudice Google**

4 Plaintiffs seek to preclude evidence that the term “porn mode” is used to refer to Incognito.  
5 Mot. 4. Google has no intention of describing Incognito as “porn mode.” But because Plaintiffs have  
6 not complied with the Court’s requirement that they “specify the precise exhibits or proffered  
7 testimony the party seeks to exclude,” Dkt. 392, ¶ 4(a), Google does not know what specific  
8 documents, if any, Plaintiffs seek to keep out.

9 The only exhibit referencing “porn mode” of which Google is aware is internal Google  
10 correspondence from February 2009, where the term was repeatedly used in the email thread and  
11 subject line. Trebicka Decl., Ex. C (GOOG-BRWN-00225677) at 1. *Plaintiffs* put this document on  
12 their exhibit list (Google did not). Trebicka Decl., Ex. D (Pls.’ Exhibit List) at 1. Google does not  
13 object to its exclusion. But if Plaintiffs insist on showing it to the jury—but redacting “porn mode”—  
14 that would prejudice Google. Plaintiffs have used this document in discovery to suggest Google had  
15 something to hide. Trebicka Decl., Ex. E (Rakowski Dep.) at 246:22-250:3 (asking why someone  
16 in the email said it “may not be [] suitable for email” and CEO Sundar Pichai said “[p]ls dont discuss  
17 more”). If Google has to rebut such insinuations using a heavily redacted document involving its  
18 CEO, it would indeed look as if Google has something to hide, when in reality the redaction covers  
19 nothing nefarious but the silly, if puerile, phrase “porn mode.” *See, e.g., Johns Hopkins Univ. v.*  
20 *Alcon Lab’ys Inc.*, 2018 WL 4178159, at \*8 (D. Del. Aug. 30, 2018) (“[W]itnesses at trial should  
21 not have to carefully dance around a word ... unless absolutely necessary.”).<sup>1</sup>

### 22 **III. CONCLUSION**

23 The Motion should be denied.

---

24  
25  
26 <sup>1</sup> If the Court decides to grant Plaintiffs’ motion, it should not be limited to the term “porn mode,”  
27 but encompass any disparaging terminology. That would include any reference by Plaintiffs to  
28 Google’s alleged practices as “unlawful voyeurism,” which doubles as both an improper legal  
conclusion and (ironically) a sexually suggestive pejorative. Pretrial Statement at 1; *see also id.* at  
5, 62.

1 DATED: October 17, 2023

Respectfully submitted,

2 QUINN EMANUEL URQUHART &  
3 SULLIVAN, LLP

4 By /s/ Andrew H. Schapiro

5 Andrew H. Schapiro (admitted *pro hac vice*)  
andrewschapiro@quinnemanuel.com  
6 Teuta Fani (admitted *pro hac vice*)  
teutafani@quinnemanuel.com  
7 Joseph H. Margolies (admitted *pro hac vice*)  
josephmargolies@quinnemanuel.com  
8 191 N. Wacker Drive, Suite 2700  
Chicago, IL 60606  
9 Telephone: (312) 705-7400  
10 Facsimile: (312) 705-7401

11 Diane M. Doolittle (CA Bar No. 142046)  
dianedoolittle@quinnemanuel.com  
12 Sara Jenkins (CA Bar No. 230097)  
sarajenkins@quinnemanuel.com  
13 555 Twin Dolphin Drive, 5th Floor  
14 Redwood Shores, CA 94065  
Telephone: (650) 801-5000  
15 Facsimile: (650) 801-5100

16 Stephen A. Broome (CA Bar No. 314605)  
stephenbroome@quinnemanuel.com  
17 Viola Trebicka (CA Bar No. 269526)  
violatrebicka@quinnemanuel.com  
18 Crystal Nix-Hines (Bar No. 326971)  
crystalnixhines@quinnemanuel.com  
19 Rachael L. McCracken (CA Bar No. 252660)  
rachaelmccracken@quinnemanuel.com  
20 Alyssa G. Olson (CA Bar No. 305705)  
alyolson@quinnemanuel.com  
21 865 S. Figueroa Street, 10th Floor  
22 Los Angeles, CA 90017  
23 Telephone: (213) 443-3000  
24 Facsimile: (213) 443-3100

1 Jomaire Crawford (admitted pro hac vice)  
2 jomairecrawford@quinnemanuel.com  
3 D. Seth Fortenbery (admitted *pro hac vice*)  
4 sethfortenbery@quinnemanuel.com  
5 51 Madison Avenue, 22nd Floor  
6 New York, NY 10010  
7 Telephone: (212) 849-7000  
8 Facsimile: (212) 849-7100

9 Xi (“Tracy”) Gao (CA Bar No. 326266)  
10 tracygao@quinnemanuel.com  
11 Carl Spilly (admitted *pro hac vice*)  
12 carlspilly@quinnemanuel.com  
13 1300 I Street NW, Suite 900  
14 Washington D.C., 20005  
15 Telephone: (202) 538-8000  
16 Facsimile: (202) 538-8100

17 Jonathan Tse (CA Bar No. 305468)  
18 jonathantse@quinnemanuel.com  
19 50 California Street, 22nd Floor  
20 San Francisco, CA 94111  
21 Telephone: (415) 875-6600  
22 Facsimile: (415) 875-6700

23 *Attorneys for Defendant Google LLC*  
24  
25  
26  
27  
28